tly states in the letter to the defendant, "You use unethical ways and means of passing off "Lee Aik" as "Lee Teow Kee" and transfer the whole sawmill." But this sentence was in reference to several properties belonging to Lee Chan and allegedly not distributed to the rightful beneficiaries.

My distinct impression is that the plaintiff genuinely felt there had been fraud practised by the defendant and he wanted to tailor his evidence to suit his case. My other distinct impression is that there was a genuine dispute between the plaintiff and the defendant over several lots of land which included the subject matter of this suit. It may well have been that some properties of Lee Chan have not been distributed to all the rightful beneficiaries. But that is not in issue before me – that is a different matter altogether from the present dispute in this case. The court cannot act on conjectures.

It is settled law that a higher standard of proof is required where fraud is alleged than that required for proving ordinary matters in a civil action. (See *Bater* v. *Bater,*[4] *Netherlands Trading Society* v. *Koh Kim Guan.*[5]) I can see no proof at all, let alone a higher standard of proof, in this case where fraud has been alleged.

In view of my finding that no fraud has been proved in this case and that there is no proof that the disputed land belonged to Lee Chan, the plaintiff's father, it is not necessary for me to go into the issue of limitation or any of the other matters in the pleadings. I accordingly dismiss the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *Shook Lin & Bok; S.M. Yeong & Co.*

LIM KIAP KHEE v. PUBLIC PROSECUTOR

[O.Cr.J. (Zakaria Yatim J.) October 30, 1987]

[Kuala Lumpur – Federal Territory Miscellaneous Application No. Cr. 54-28-87]

Criminal Procedure – Bail – Non-bailable offence – Bail at discretion of court – Gravity of crime – Conditions of bail – Whether passport can be impounded – Criminal Procedure Code (F.M.S. Cap. 6) s.388.

Passport – Impounding of – Whether a condition of bail – Whether authorised by law – Criminal Procedure Code (F.M.S. Cap. 6), s.388.

In this case the applicant had been charged in the Sessions Court with two charges of criminal breach of trust punishable under section 409 of the Penal Code. The applicant claimed trial and the court fixed the date of hearing in October 1988. After hearing the parties, the learned Sessions judge fixed bail at $300,000.00 in two sureties and ordered the passports of the applicant to be impounded. Subsequently on the application of counsel for the applicant, the restricted passport of the applicant was ordered to be released to him. His international passport, however, remained impounded. The applicant applied for his international passport to be released to him.

Held: (1) since the applicant was charged with a non-bailable offence, bail is at the discretion of the court and in exercising its discretion the court must consider the gravity of the offence;

(2) in non-bailable offences, the court has an absolute discretion under section 388 of the Criminal Procedure Code whether to allow bail or to refuse bail except in cases punishable with death or imprisonment for life. In granting bail, the court may, in addition to stating the amount of bail and the number of sureties, impose reasonable conditions, including a condition requiring the accused person to surrender his passport. When the court lays down the conditions for bail, it is left to the accused whether to comply with it or not. If, for example, he does not want to surrender his passport then he opts to remain in custody;

(3) if the court decides that one of the conditions of bail is to require the accused to surrender his passport, it is immaterial whether the accused is a citizen of this country or a foreigner or whether he is holding a Malaysian passport or a passport issued by a foreign government;

(4) in this case, the Sessions Court ordered that the passport be impounded. The order was certainly not one of the conditions of bail. Therefore the order made by the court in respect of the passport did not fall within the scope of section 388 of the Criminal Procedure Code;

(5) in the absence of any law empowering the court to impound the applicant's passport, the order made by the learned Sessions judge was not a valid order. The order must therefore be set aside.

Cases referred to:

(1) *Public Prosecutor* v. *Mat Zain* [1948-49] M.L.J. Supp. 147.
(2) *Re K.S. Menon* [1946] M.L.J. 49.
(3) *R.* v. *Genda Singh & Ors.* A.I.R. 1950 All. 525.
(4) *In re Saradamma & Ors.* A.I.R. 1965 A.P. 444.

(5) *Hazari Lal Gupta* v. *Rameshwar Prasad & Anor.* A.I.R. 1972 S.C. 484.
(6) *Government of Malaysia & Ors.* v. *Loh Wai Kong* [1979] 2 M.L.J. 33.

APPLICATION.

Manjeet Singh Dhillon for the applicant.

Tan Hock Guan (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

Zakaria Yatim J.: This is an application by notice of motion for an order of the court that the applicant's international passport, which was impounded by the Sessions Court in respect of arrest case No. 74-133-87, be released to him. The application is supported by the affidavit of the applicant. The Public Prosecutor filed an affidavit-in-reply affirmed by the investigating officer in the said arrest case.

The applicant was charged in the Sessions Court on September 29, 1982 with two charges of criminal breach of trust punishable under section 409 of the Penal Code. The applicant claimed trial to both charges. The court then fixed the dates of hearing in October 1988.

After the plea was recorded, the question of bail was considered. I have obtained a certified true copy of the record of the proceedings held on September 28, 1982 in respect of this case. According to the record, Mr. Tan Hock Guan, the deputy public prosecutor, told the court that the applicant was charged with non-bailable offences. He said he had no objection to bail being granted to the applicant. He suggested that bail be set at not less than $400,000.00. He also asked the court that the applicant's passports be "impounded". Mr. W.K. Leong, counsel for the applicant in the court below, asked the court to reduce the amount of bail suggested by Mr. Tan. He also asked the court for an order that the applicant's passports be returned to him.

After hearing the submissions of both Mr. Tan and Mr. Leong, the learned Sessions judge made the following order:

"Bail is set at $300,000.00 in two sureties.
Passports to be *impounded.*"
[Emphasis added].

At 3.30 pm on the same day, both parties appeared before the learned Sessions judge again. Mr. Leong asked that the restricted passport of the applicant be released to him. Mr. Tan had no objection and the learned Sessions judge ordered that the restricted passport be released to the applicant. His international passport, however, remained impounded.

The question for the court to consider in the present application is whether the learned Sessions judge was right in law in ordering the international passport to be impounded in addition to the order of granting bail.

With regard to bail, it is clear that the relevant provision of the law is section 388 of the Criminal Procedure Code since the applicant was charged with non-bailable offences. In non-bailable cases, bail is at the discretion of the court and in exercising its discretion the court must consider the gravity of the crime: *Public Prosecutor* v. *Mat Zain.*[1] Indeed under the section, a judge has absolute discretion in granting bail. The discretion must, however, be exercised judicially: *Re K.S. Menon.*[2] In the instant case, the learned deputy had told the Sessions Court that he had no objection to bail being granted to the applicant. In the circumstances, all the court had to do was to set the amount of bail and the number of sureties, which was done in this case.

The question that arises here is whether under section 388, the court has the power to impose conditions when granting bail. There appears to be no decision by the courts in this country on this point. It is useful to look at the decisions of the courts in India since section 388 is almost identical with section 497 of the Indian Criminal Procedure Code of 1890. Although the 1890 Code had been replaced by a new code in 1973, decisions of the Indian courts on section 497 of the 1890 Code would be persuasive authorities in this country. Section 497(1) of the 1890 Code is reproduced below:

"497(1) When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:

Provided that the court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail."

In India, under section 497, the court could impose conditions other than the fixing of bail for

the attendance of the accused. In *Rex* v. *Genda Singh & Others,*[3] Raghubar Dayal J. said:

"Conditions were imposed in orders granting bail in certain cases of non-bailable offences ... Under section 497 Criminal Procedure Code, which provides for bail in non-bailable cases, it is discretionary for the court to grant bail. In certain circumstances mentioned in subsection (1) bail is not to be granted and in certain circumstances mentioned in subsection (1) bail has to be granted by the court. When discretion is given to the court to refuse bail or to grant it, that discretion itself implies a discretion to grant bail subject to certain conditions ..."

The conditions imposed by the court, must, however, be reasonable. In *Re Saradamma and Others,*[4] it was held that an order imposing a condition that the accused should confine their movements to the municipal limits of the town as long as the case was pending and report themselves twice a day to the police station was not illegal. In that case, Venkatesam J., at p. 446, said:

"Thus in the case of non-bailable offences ... a discretion is conferred on the court whether to enlarge or not to enlarge the accused on bail. When the court is thus conferred a discretion and in the exercise of that discretion it considers necessary to impose certain conditions, can it be said that those conditions are illegal? ... Having regard to this well established line of authority I hold that in the case of non-bailable offences, a court may impose conditions other than the fixing of the bail for the attendance of the accused, and such a condition is not illegal."

In *Hazari Lal Gupta* v. *Rameshwar Prasad and Another,*[5] the Indian Supreme Court held, *inter alia,* that the High Court while granting bail to an accused person, an Indian national residing in a foreign country, could restrict his departure from India by requiring him to surrender his passport. In that case, the appellant had been living and doing business in the United Kingdom since 1963. He was dealing in the business of carpets imported from India. The appellant withheld payments being the price of carpets supplied to him. For several years, the appellant failed to pay the money. When he arrived in India in 1970, a report was lodged against him. He was arrested for offences under sections 406 and 420 of the Indian Penal Code. Bail was refused at first but when the matter went up to the High Court, the High Court ordered that there would be no harm if the appellant was further ordered to surrender his passport to the magistrate. The appellant was released on bail after furnishing the surety to the tune of Rs10,000.00 and after surrendering his passport to the magistrate. Ray J., in delivering the judgment of the Supreme Court, said at p. 486 in the following words:

"On behalf of the appellant it was said that sections 496, 497 and 498 of the Criminal Procedure Code in relation to bail did not confer any power on the court when granting bail to restrict the departure of the appellant from India by requiring the appellant to surrender the passport. Sections 496, 497 and 498 of the Criminal Procedure Code are not exhaustive of powers of the court in regard to terms and conditions of bail particularly when the High Court under section 561-A of the Criminal Procedure Code deals with cases of this type. *The apprehension of the appellant jumping bail could not be brushed aside. If the appellant wanted to retain the passport the court might not have granted the appellant any bail.* Again, the reduction of the surety was made in order to enable the appellant to be enlarged on bail. The reduction of surety was also on the consideration that the appellant would not leave India." [Emphasis added].

Apart from India, the position in England is also the same. In England, a condition of bail sometimes imposed is that the defendant surrenders his passport. As this is a device to prevent the defendant from absconding abroad, it should be accompanied by a post-release condition stipulating that the defendant shall not leave Great Britain during the period of bail: *Archbold Criminal Pleading, Evidence and Practice,* 42nd. Ed. p. 166.

Finally, reference should be made to a *dictum* by Suffian L.P. in *Government of Malaysia and Ors.* v. *Loh Wai Kong.*[6] In delivering the judgment of the Federal Court, the Lord President said:

"On August 2, 1976, he was charged in court in Ipoh with criminal offences. His passport was surrendered to court as a condition of bail ... In our judgment ... Mr. Jag-Jit Singh was ... correct in saying that in certain circumstances the Government has to stop a citizen (or indeed even a non-citizen) from leaving: certainly when, as in this case, there is a criminal charge pending against him."

It is clear from the authorities cited above, in non-bailable offences, the court has the absolute discretion under section 388 whether to allow bail or to refuse bail except in cases punishable with death or imprisonment for life. In granting bail, the court may, in addition to stating the amount of bail and the number of sureties, impose an additional condition requiring the accused person to surrender his passport. If he complies with these conditions, then he is released on bail. If he fails to comply with any of these conditions, then he is kept in remand until his trial. When the court lays down the conditions for bail, it is left to the accused whether to comply with the conditions or not. The choice is entirely his. If he does not want to surrender his passport, then he opts to remain in custody.

Counsel for the applicant, Mr. Manjeet Singh Dhillion, submitted that the international passport

impounded by the court below is a Singapore passport issued by the Government of the Republic of Singapore. In my opinion, if the court decides that one of the conditions of bail is to require that the accused surrenders his passport, it is immaterial whether the accused is a citizen of this country or a foreigner or whether he is holding a Malaysian passport or a passport issued by a foreign government. Before our court, no one is to be treated differently. Under the Federal Constitution, all persons are equal before the law and entitled to equal protection of the law (Article 8(1)).

The question for the court to consider now is whether the order of the court below impounding the applicant's passport forms one of the conditions of bail. In order to answer this question, it is necessary to examine the meaning of the word "impounded". According to the *Oxford English Dictionary*, the word "impound" means "to seize or secure by legal right; to take legal or formal possession of (a document or the like) to be held in custody of the law". *Stroud's Judicial Dictionary of Words and Phrases*, 5th Ed., states: "A document is impounded when it is ordered by a court to be kept in the custody of its officer." It is clear from these definitions that when a document is impounded, it is ordered or compelled by the court to be kept by its officer and the court makes the order under the authority of the law.

In the instant case, the court ordered that the passport be impounded. The order was certainly not one of the conditions of bail. Therefore, the order made by the court below in respect of the passport did not fall within the scope of section 388 of the Criminal Procedure Code.

The question now is whether the court below had the authority to impound the passport under any other law. The only relevant law is the Malaysian Passports Act 1966 (Revised – 1974). But this Act does not contain any provision empowering the court or the government to impound a passport.

In the absence of any law empowering the court below to impound the applicant's passport, the order made by the learned Sessions judge was not a valid order. Indeed, such an order amounts to punishing the applicant without the authority of the law.

I accordingly set aside the order of the learned Sessions judge with regard to the impounding of the applicant's passport and order that the passport be returned to the applicant forthwith.

Order accordingly.

Solicitors: *Lawrence Dhillon & Associates.*

SARI ATLANTIC SDN. BHD. v. AIK KIM ENTERPRISE

[O.C.J. (Lim Beng Choon J.) July 16, 1987]

[Alor Setar – Company Winding Up 42-01-87]

Companies and corporations – Winding up – Petition for – Non-compliance with rule 26 of the Companies (Winding Up) Rules 1972 – Whether fatal to petition – Whether curable by court – Companies Act (Act 125), s. 221(2).

A petition was presented to the court to wind up the respondent company. However, the affidavit verifying the petition was affirmed about four days before the presentation of the petition itself, which was a clear failure to comply with rule 26 of the Companies (Winding Up) Rules 1972. At the hearing of the petition, the respondent company contended that the non-compliance was a fatal defect and that the petition must be rejected as this court had no power to cure such a defect.

Held: (1) in this case, none-compliance with rule 26 does not render the petition a nullity and is curable by the court;

(2) section 221(2) of the Companies Act allows the court to cure a technical error which does no injustice to the respondents.

Cases referred to:

(1) *Chin Yoon Timber Co.* v. *Overseas Lumber Bhd.* [1978] 2 M.L.J. 173.

(2) *The Western Benefit Building Society* 55 E.R. 409; (1864) 33 Beav. 368.

(3) *Sam Hin Timber Co.* v. *Perusahaan Sri Duyong Sdn. Bhd.* [1983] 2 C.L.R. 269.

WINDING-UP PETITION.

Mdm. Poh Ah Leng for the petitioner.

Francis Nather for the respondent.

Cur. Adv. Vult.

Lim Beng Choon J.: A petition for the winding up of Aik Kim Enterprise Sdn. Bhd. (hereinafter referred to as the Company) was presented